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REPORT OF THE SECRETARY-GENERAL PURSUANT TO PARAGRAPH 5 OF SECURITY COUNCIL RESOLUTION 955 (1994)

I. INTRODUCTION

1. Resolution 955 (1994) of 8 November 1994, by which the Security Council established an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandese citizens responsible for genocide and other such violations committed in the territory of neighbouring States, represented the culmination of a series of resolutions in which the Council had condemned the systematic and widespread violations of international humanitarian law in Rwanda and, in particular, the mass killing of tens of thousands of civilians with impunity.

2. In resolution 918 (1994) of 17 May 1994, the Secretary-General was requested to present a report on the investigation of serious violations of international humanitarian law committed in Rwanda. In my report to the Council of 31 May 1994 (S/1994/640), I noted that massacres and killings had continued in a systematic manner throughout Rwanda and that only a proper investigation could establish the facts in order to determine responsibility.

3. By resolution 935 (1994) of 1 July 1994, the Secretary-General was requested to establish an impartial commission of experts. In its interim report (S/1994/1125), the Commission submitted its preliminary conclusions on serious breaches of international humanitarian law and acts of genocide committed in Rwanda, and recommended that the individuals responsible for those acts be brought to justice before an independent and impartial international criminal tribunal. In its final report (S/1994/1405), the Commission concluded that there existed overwhelming evidence to prove that acts of genocide against the Tutsi ethnic group had been committed by Hutu elements in a concerted, planned, systematic and methodical way, in violation of article II of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 1/ (hereinafter "the Genocide Convention"); that crimes against humanity and serious violations of international humanitarian law were committed by individuals on both sides of the conflict, but there was no evidence to suggest that acts committed by Tutsi elements were perpetrated with an intent to destroy the Hutu ethnic group as such, within the meaning of the Genocide Convention.

4. The present report is submitted pursuant to paragraph 5 of resolution 955 (1994), by which the Security Council requested the Secretary-General to implement the resolution urgently and to make practical arrangements for the effective functioning of the Tribunal, including recommendations to the Council as to possible locations for the seat of the Tribunal, and to report periodically to the Council.

5. While the Council has been periodically informed of the implementation of resolution 955 (1994), through letters from the Secretary-General, oral briefings and recently through the progress report on the United Nations Assistance Mission for Rwanda (UNAMIR) (S/1995/107, paras. 19-22), this is the first time that the Secretary-General is submitting a formal report on the Tribunal. Accordingly, I have decided that it would be useful to provide the Council with a comprehensive report. The first section analyses the legal basis for the establishment of the International Tribunal for Rwanda (hereinafter also referred to as "the Rwanda Tribunal") and its legal status. The second contains a succinct review of the main provisions of the statute of the Rwanda Tribunal where they differ from the provisions of the statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (hereinafter "the Yugoslav Tribunal") (see S/25704). The third section of the report outlines the two-stage approach to the establishment of the Rwanda Tribunal and the practical arrangements made thus far for its functioning. Finally, in the fourth section of the report, the Secretary-General examines the various options for the location of the seat of the Tribunal in the light of the criteria set out in paragraph 6 of resolution 955 (1994) and makes his recommendation for the location of the seat of the Tribunal.

II. LEGAL BASIS FOR THE ESTABLISHMENT OF THE INTERNATIONAL TRIBUNAL FOR RWANDA

6. Having determined on two previous occasions that the situation in Rwanda constituted a threat to peace and security in the region, 2/ the Council, in its resolution 955 (1994), determined that the situation in Rwanda continued to constitute a threat to international peace and security and, accordingly, decided to establish the International Tribunal for Rwanda under Chapter VII of the Charter of the United Nations. The establishment of the International Tribunal under Chapter VII, notwithstanding the request received from the Government of Rwanda, 3/ was necessary to ensure not only the cooperation of Rwanda throughout the life-span of the Tribunal, but the cooperation of all States in whose territory persons alleged to have committed serious violations of international humanitarian law and acts of genocide in Rwanda might be situated. A Tribunal based on a Chapter VII resolution was also necessary to ensure a speedy and expeditious method of establishing the Tribunal.

7. Unlike the establishment of the Yugoslav Tribunal, which was done in a two-stage process of two Security Council resolutions (resolutions 808 (1993) and 827 (1993)), the Security Council decided that, in drawing upon the experience

gained in the Yugoslav Tribunal, a one-step process and a single resolution would suffice to establish the International Tribunal for Rwanda.

8. The International Tribunal for Rwanda is a subsidiary organ of the Security Council within the meaning of Article 29 of the Charter. As such, it is dependent in administrative and financial matters on various United Nations organs; as a judicial body, however, it is independent of any one particular State or group of States, including its parent body, the Security Council.

9. The establishment of the Rwanda Tribunal at a time when the Yugoslav Tribunal was already in existence, dictated a similar legal approach to the establishment of the Tribunal. It also mandated that certain organizational and institutional links be established between the two Tribunals to ensure a unity of legal approach, as well as economy and efficiency of resources. The statute of the Rwanda Tribunal, which was an adaptation of the statute of the Yugoslav Tribunal to the circumstances of Rwanda, was drafted by the original sponsors of Security Council resolution 955 (1994) and discussed among members of the Council. Rwanda, as a member of the Security Council at the time that resolution 955 (1994) was adopted, thus participated fully in the deliberations on the statute and the negotiations leading to the adoption of the resolution.

III. MAIN PROVISIONS OF THE STATUTE OF THE INTERNATIONAL TRIBUNAL FOR RWANDA

A. Competence of the International Tribunal

10. The competence of the International Tribunal for Rwanda is circumscribed in time, place and subject-matter jurisdiction. Article 1 of the statute provides that the International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandese citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994. The crimes in respect of which the Tribunal is competent are set out in articles 2 to 4 of the statute.

1. Subject-matter jurisdiction

11. Given the nature of the conflict as non-international in character, the Council has incorporated within the subject-matter jurisdiction of the Tribunal violations of international humanitarian law which may either be committed in both international and internal armed conflicts, such as the crime of genocide 4/ and crimes against humanity, 5/ or may be committed only in internal armed conflict, such as violations of article 3 common to the four Geneva Conventions, 6/ as more fully elaborated in article 4 of Additional Protocol II. 7/

12. In that latter respect, the Security Council has elected to take a more expansive approach to the choice of the applicable law than the one underlying the statute of the Yugoslav Tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of

whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime. Article 4 of the statute, accordingly, includes violations of Additional Protocol II, which, as a whole, has not yet been universally recognized as part of customary international law, and for the first time criminalizes common article 3 of the four Geneva Conventions. 8/

2. Territorial and temporal jurisdiction

13. The territorial jurisdiction of the International Tribunal extends beyond the territory of Rwanda to that of neighbouring States, in respect of serious violations of international humanitarian law committed by Rwandese citizens. In extending the territorial jurisdiction of the Tribunal beyond the territorial bounds of Rwanda, the Council envisaged mainly the refugee camps in Zaire and other neighbouring countries in which serious violations of international humanitarian law are alleged to have been committed in connection with the conflict in Rwanda.

14. The temporal jurisdiction of the Tribunal is limited to one year, beginning on 1 January 1994 and ending on 31 December 1994. Although the crash of the aircraft carrying the Presidents of Rwanda and Burundi on 6 April 1994 is considered to be the event that triggered the civil war and the acts of genocide that followed, the Council decided that the temporal jurisdiction of the Tribunal would commence on 1 January 1994, in order to capture the planning stage of the crimes.

B. Organization and structure of the International Tribunal

15. The International Tribunal for Rwanda consists of three organs:

(a) The chambers, comprising two trial chambers and an appeals chamber; each Trial Chamber is composed of three judges and the Appeals Chamber is composed of five;

(b) A Prosecutor; and

(c) A Registry.

16. Under article 12, paragraph 2, of the statute, the members of the Appeals Chamber of the International Tribunal for the Former Yugoslavia shall also serve as the members of the Appeals Chamber of the International Tribunal for Rwanda. In providing for a common Appeals Chamber for the two Tribunals, the Council was aware of the fact that, if no restrictions are put on the nationalities of nominees for judges, there could be a situation where more than one judge of the Rwanda Tribunal will have the same nationality. In order to prevent such an eventuality, article 12, paragraph 3 (b), of the Rwanda statute provides in its relevant part that:

"... each State may nominate up to two candidates meeting the qualifications set out in paragraph 1 above, no two of whom shall be of the same nationality and neither of whom shall be of the same nationality as any judge of the Appeals Chamber".

17. Article 15, paragraph 3 of the Statute of the Rwanda Tribunal provides that the Prosecutor of the International Tribunal for the Former Yugoslavia shall also serve as the Prosecutor of the International Tribunal for Rwanda, with such additional staff, including an additional Deputy Prosecutor, to assist with prosecutions before the International Tribunal for Rwanda. The statute thus envisages commonality not only in the person of the Prosecutor, but also in the staff of the Prosecutor's Office.

C. Other statutory provisions

18. Article 14 of the statute of the Rwanda Tribunal provides that the judges of the International Tribunal shall adopt the rules of procedure and evidence for the conduct of the pretrial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the Former Yugoslavia, with such changes as they deem necessary. It was thus the intention of the Council that, although the rules of procedure and evidence of the Yugoslav Tribunal should not be made expressly applicable to the Rwanda Tribunal, they should nevertheless serve as a model from which deviations will be made when the particular circumstances of Rwanda so warrant.

19. Imprisonment shall, according to article 26 of the statute, be served in Rwanda, or in any of the States on a list of States that have indicated to the Security Council their willingness to accept convicted persons. Unlike the former Yugoslavia, Rwanda is not excluded from the list of States where prison sentences pronounced by the International Tribunal for Rwanda may be served.

20. Article 30 of the statute provides that the expenses of the Tribunal shall be the expenses of the Organization in accordance with Article 17 of the Charter. In clearly distinguishing between the competence of the Security Council to establish the International Tribunal and the budgetary authority of the General Assembly to decide on its financing, the Security Council did not pronounce itself on the mode of financing, i.e., regular budget or a special account.

III. PRACTICAL IMPLEMENTATION OF SECURITY COUNCIL RESOLUTION 955 (1994)

21. The urgent need to start up the operation of the International Tribunal for Rwanda immediately necessitated a phased approach to the establishment of the Tribunal in accordance with the chronological order of the legal process, from the stage of the investigation and the preparation of indictments to the conduct of trial proceedings. A phased approach also facilitated more accurate estimates of the full financial requirements of the Tribunal over time and as information became gradually available.

22. I, therefore, approved a plan for the establishment of the Tribunal in two phases. The first phase envisaged the establishment of an investigative/prosecutorial unit, the appointment of the Deputy Prosecutor and a core unit of investigators, prosecutors and interpreters, the retention of office premises for the Investigative/prosecutorial Unit, the establishment of an Administrative unit and a secretariat, and the preparation of a request for initial funding. In the second phase, judges will be elected, practical arrangements for the establishment of the seat will be put in place, the staffing will be completed and the Tribunal, as a whole, will be fully operational.

A. First phase of the operation of the International Tribunal

23. The first phase of the operation of the International Tribunal for Rwanda began with the establishment of the Investigative/prosecutorial Unit in Kigali. The main functions of the Unit are to establish the Prosecutor's Office and recruit staff, gather documents and information from Governments, intergovernmental and non-governmental organizations, transfer all information collected from the Commission of Experts established pursuant to Security Council resolution 935 (1994) and the Special Investigative Unit established by the High Commissioner for Human Rights, develop the investigative strategy and field operational procedures and initiate the process of investigations and the preparation of indictments.

24. With a view to utilizing, to the extent possible, existing human and financial resources and drawing upon the experience already gained by the Prosecutor and the High Commissioner for Human Rights in the investigations of serious violations of international humanitarian law, it was decided that the core Investigative Unit would consist of investigators of the Prosecutor's Office of the International Tribunal for the Former Yugoslavia and of the Special Investigative Unit established by the High Commissioner for Human Rights.

25. In accordance with article 15, paragraph 3, of the statute of the Rwanda Tribunal, I appointed Mr. Honoré Rakotomanana (Madagascar) as the Deputy Prosecutor. Mr. Rakotomanana has already initiated the operation of the Unit in Kigali and is engaged in staffing his Office.

26. Temporary office space for the initial phase of the operation of the Investigative/Prosecutorial Unit has been identified in the UNICEF Building in Kigali, where the core investigative Unit is currently located. Office premises in the UNAMIR compound have also been identified as a possible permanent location for the Unit.

27. Security for the Investigative/Prosecutorial Unit, its premises and investigators while on mission, will be provided by UNAMIR in accordance with Security Council resolution 965 (1994).

28. A small Administrative Unit has been established, initially within the Office of Legal Affairs, to support the start-up operations of the Prosecutor's Office in Rwanda. The Administrative Unit, which forms the core registry, is

presently handling all administrative, financial and personnel matters pertaining to the commencement of the operation of the Tribunal.

29. A trust fund to assist in the activities of the International Tribunal for Rwanda was established by the Secretary-General pursuant to Security Council resolution 955 (1994), and a letter inviting States, intergovernmental and non-governmental organizations to contribute funds, equipment and services to the International Tribunal, including the offer of expert personnel, was sent out on 9 January 1995. Contributions to the Trust Fund have already been received from several States, including a pledge to donate equipment in the equivalent amount of $1 million.

30. Pending the preparation of a full budgetary submission to the General Assembly of the estimated financial requirements of the International Tribunal for Rwanda for the biennium 1994-1995, a request has been submitted to the Advisory Committee on Administrative and Budgetary Questions (ACABQ) for the initial funding of the first phase of the operation, i.e., 1 January-31 March 1995. The estimated requirements, based on the anticipated activities to be carried out during that period are in the amount of $3,951,200. They include recruitment of the core investigative and administrative staff, retention of office premises, procurement and establishment of computer and communications systems, administrative costs, costs of transfer of materials between Rwanda, Geneva and The Hague in connection with the Commission of Experts and travel costs on official business between these locations and within Rwanda.

31. Pending consideration of the request by ACABQ, resources have been made available from the Trust Fund to permit initial recruitment and travel of staff from the Yugoslav Tribunal to Rwanda. In addition, the Secretary-General has authorized expenditures up to a maximum of $191,600 for the period 15 January to 14 February 1995.

B. Second phase of the operation of the International Tribunal

32. Once the Security Council has made a determination as to the seat of the Tribunal, the process of electing judges will commence. With a common Appeals Chamber composed of five judges already in place, only six trial judges will have to be elected. Since the judges have to adopt rules of procedure and evidence, it is essential that they are elected as soon as possible. At the same time it is important that the judges take office shortly before the commencement of trial proceedings to avoid the financial implications entailed in their taking office too early. I therefore envisage a special session of the judges to be convened for the sole purpose of adopting the rules of procedure and evidence.

33. Upon the determination of the seat, negotiations will be undertaken by the Office of Legal Affairs with the host country to conclude a headquarters agreement and a lease agreement for the premises of the Tribunal.

34. During the second stage of the operation of the Tribunal, the process of the staffing of the Prosecutor's Office and the Registry will be completed and the Tribunal, as a whole, will be fully operational.

IV. LOCATION OF THE SEAT OF THE INTERNATIONAL TRIBUNAL FOR RWANDA

A. Guidelines for the determination of the seat

35. By paragraph 6 of its resolution 955 (1994), the Security Council decided that the seat of the International Tribunal would be determined by the Council, having regard to considerations of justice and fairness as well as administrative efficiency, including access to witnesses, and economy and subject to the conclusion of appropriate arrangements between the United Nations and the State of the seat acceptable to the Council, having regard to the fact that the International Tribunal may meet away from its seat when it considers it necessary for the efficient exercise of its functions. The Council furthermore decided that an office will be established and proceedings will be conducted in Rwanda, where feasible and appropriate, subject to the conclusion of similar appropriate arrangements.

36. In examining the question of the seat for the purpose of paragraph 6 of Security Council resolution 955 (1994), a flexible approach was adopted. Although normally, the seat of a tribunal would indicate the place where all its organs are located, in the present case the "seat" of the International Tribunal for Rwanda is interpreted to mean the place where trial proceedings are held and trial chambers are located. With a common Appeals Chamber and a common Prosecutor already located in The Hague and the Investigative/Prosecutorial Unit already established in Kigali, the operations of the Rwanda Tribunal, ranging from investigation, preparation of indictments and trial proceedings, both in the Trial Chambers and in the Appeals Chamber, will most probably be carried out in three different locations. It may be noted, however, that, although the various organs of the International Tribunal, wherever located, form part of the Tribunal, a determination of the seat is required by paragraph 6 of resolution 955 (1994) only in respect of the location of trial proceedings.

37. In examining the possible locations for the seat of the Tribunal in the light of the criteria set out in paragraph 6 of resolution 955 (1994), the Secretary-General has been guided by the preference expressed for Rwanda as the location of the seat if feasible and appropriate, or for any other location meeting the criteria set out in the resolution, including, in particular, "access to witnesses". A preference for an "African seat" was thus indicated by the Security Council. Based on this preference the Secretary-General decided that a technical mission to identify suitable premises for the seat of the International Tribunal would visit Rwanda and two of its neighbouring countries, Kenya and the United Republic of Tanzania.

B. Various options for the location of the seat

1. Technical mission report

38. A technical mission headed by the Chief, Administrative and Operations Section, Buildings Management Service of the United Nations Secretariat, visited Rwanda, Kenya and the United Republic of Tanzania during the second half of December 1994. In surveying available premises for the seat of the Tribunal in all three locations, the mission concluded that:

(a) There is a severe shortage of premises in Kigali that could accommodate the needs of the Tribunal properly and provide adequate security. Most buildings suffered heavy damage as a result of the war and extensive and costly repairs would be needed to make them operational again;

(b) Nairobi, as a possible location for the seat of the Tribunal, has the advantage of having the necessary infrastructure, support facilities and communication systems and, more importantly, it has a large United Nations presence. Government officials initially indicated that they would be willing to assist in identifying suitable premises if requested to do so by their Government;

(c) Unlike Nairobi, Arusha lacks adequate infrastructure, and a great number of support facilities would have to be imported. The Government of the United Republic of Tanzania, however, indicated its willingness to support the International Tribunal and assist in its accommodation in Arusha. In that connection a concrete offer was made for the Tribunal to use the premises of the Arusha International Conference Centre for its seat. The mission concluded that, with the necessary construction work, the Centre, which is a self-contained complex equipped with a developed communication system and other facilities, could constitute suitable premises for the seat of the Tribunal.

39. Following the submission of the technical report, a formal request was addressed by the Legal Counsel to the Kenyan Mission to the United Nations to assist in identifying suitable premises for the seat of the Tribunal. In response, the Permanent Representative of Kenya informed the Legal Counsel that, after careful consideration of the various aspects relating to the location of the Tribunal, the Kenyan Government decided that it would not be in a position to provide a seat for the Tribunal.

40. The question of the seat was also raised in a meeting between the Director and Deputy to the Under-Secretary-General, Office of the Legal Counsel, and the Permanent Representative of Rwanda to the United Nations. The Rwandan Ambassador reiterated his Government's position that the seat of the Tribunal should be located in Kigali for the moral and educational value that its presence there would have for the local population. In a spirit of compromise and cooperation, however, he indicated that his Government would raise no objection to the seat of the Tribunal being established in a location easily accessible to Rwanda in a neighbouring State.

2. Criteria for determination of the seat

41. Against this background the Secretary-General has undertaken an examination of the criteria set out in paragraph 6 of resolution 955 (1994) in respect of two countries: Rwanda and the United Republic of Tanzania.

"Justice and fairness"

42. In the view of the Secretary-General, the criterion of "justice and fairness" in the context of selecting a location for the seat means the conduct of trial proceedings in an environment that would ensure justice and fairness to both victims and accused. Although the international character of the Rwanda Tribunal is a guarantee of the just and fair conduct of the legal process, it is nevertheless necessary to ensure not only the reality but also the appearance of complete impartiality and objectivity in the prosecution of persons responsible for crimes committed by both sides to the conflict. Justice and fairness, therefore, require that trial proceedings be held in a neutral territory.

43. In this connection, the Secretary-General notes that, in the atmosphere now prevailing in Rwanda, there are serious security risks in bringing into the country leaders of the previous regime alleged to have committed acts of genocide to stand trial before the International Tribunal.

"Administrative efficiency and economy"

44. On the basis of the technical report, the choice of Kigali as the seat of the Tribunal, even if premises were available, would have entailed extensive and costly repairs to make them operational again. Arusha, on the other hand, has the advantage of having readily available premises, which may be offered either rent-free, or at a very low rate. Furthermore, the proximity of Arusha to victims, witnesses and potential accused persons situated in Rwanda and neighbouring States, and its accessibility by air to and from all of these locations, will considerably reduce the travel costs that would be otherwise entailed in the choice of a more distant location.

3. Recommendation for the seat

45. On the basis of the foregoing and given the positions of the Governments of Rwanda, Kenya and the United Republic of Tanzania and having, in addition, examined the considerations of justice and fairness as well as administrative efficiency, including access to witnesses, and economy, as mandated by paragraph 6 of Security Council resolution 955 (1994), it is my conclusion that the choice of Rwanda as the location of the seat would not be feasible or appropriate and that Arusha, the United Republic of Tanzania, should be selected as the seat of the Tribunal. I, therefore, recommend to the Security Council that, subject to appropriate arrangements between the United Nations and the Government of the United Republic of Tanzania acceptable to the Council, Arusha be determined as the seat of the International Tribunal for Rwanda.

Notes

1/ General Assembly resolution 260 (A) (III).

2/ In resolution 918 (1994), the Council decided to impose sanctions against Rwanda and, in resolution 929 (1994), it authorized a temporary humanitarian operation under the command and control of a Member State ("Operation Turquoise").

3/ In its letter to the Secretary-General of 6 August 1994, the Government of Rwanda stated that an international tribunal, along the lines of the Yugoslav Tribunal, would help to promote peace and reconciliation among the parties and remove destabilizing elements from Rwanda and neighbouring States. The Government undertook to prevent summary executions and to hold in custody persons alleged to have committed acts of genocide pending prosecution by the International Tribunal. In addition, in a statement dated 28 September 1994 on the question of refugees and security in Rwanda (S/1994/1115, annex), the Government of Rwanda called for the setting up, as soon as possible, of an international tribunal to try persons alleged to have committed genocide.

4/ Genocide, according to article I of the Genocide Convention, is a crime under international law whether committed in time of peace or in time of war.

5/ Crimes against humanity were described in article 5 of the statute of the Yugoslav Tribunal as those enumerated in the article, "when committed in armed conflict, whether international or internal in character". Article 3 of the Rwanda statute makes no reference to the temporal scope of the crime; there is, therefore, no reason to limit its application in that respect.

6/ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949, Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of 12 August 1949, Convention relative to the Treatment of Prisoners-of-War of 12 August 1949, Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949 (United Nations, Treaty Series, vol. 75, No. 970-973).

7/ Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977, (United Nations, Treaty Series, vol. 1125, No. 17513).

8/ Although the question of whether common article 3 entails the individual responsibility of the perpetrator of the crime is still debatable, some of the crimes included therein, when committed against the civilian population, also constitute crimes against humanity and as such are customarily recognized as entailing the criminal responsibility of the individual.